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### Recognition of the African National Congress and the Apartheid Government A Proposal for the United States

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**Recognition of the African National Congress and the *Apartheid* Government:  
A Proposal for the United States**

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*Member of the Class of 1990*

**TABLE OF CONTENTS**

I. Introduction ..... 316

II. Defining Relationships with Other Entities: Looking to the Law of Recognition ..... 317

III. Defining the United States Relationship with South Africa: What is the Legal Status of the State and the Government? ..... 319

    A. The Statehood of South Africa ..... 319

    B. The Legal Status of the South African Government .. 321

        1. Illegality of the *Apartheid* Regime ..... 321

        2. Illegitimacy of the *Apartheid* Regime..... 325

IV. The Practical Result of Illegality and Illegitimacy: The Decredentialization of the *Apartheid* Government by the United Nations General Assembly and the Withdrawal of Collective Recognition from the *Apartheid* Regime ..... 326

V. Defining the Relationship of the United States with the African National Congress: Looking to Collective Recognition of the ANC as a Guide ..... 328

    A. Collective Recognition by the United Nations..... 328

    B. Collective Recognition by the Members of the Organization of African Unity..... 331

    C. Independent Recognition by Individual States..... 333

VI. Recognition of the ANC by the People of South Africa... 334

    A. The Largest Trade Union in South Africa Supports the ANC..... 335

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B. UDF Membership Reflects Support for the ANC ....	336
C. Recognition of the ANC by the Business Community .....	337
VII. The United States Practice of Recognition .....	337
VIII. Conclusion: Evaluating U.S. policy with Respect to South Africa .....	338

## I. INTRODUCTION

On February 2, 1990, South African President Frederik W. de Klerk announced the unbanning of the African National Congress (ANC).<sup>1</sup> On February 11, 1990, he released jailed ANC leader Nelson Mandela.<sup>2</sup> These moves undoubtedly will have not only dramatic domestic effects but also could have international ramifications as countries reassess their relationships with the South African government and the ANC.

The United States has had an ambiguous relationship with both the South African government and the ANC. The U.S. has simultaneously imposed economic sanctions on South Africa and refused to sign United Nations resolutions condemning South Africa.<sup>3</sup>

On January 10, 1989, President-elect George Bush issued a report which listed the African National Congress as one of fifty-two organizations around the world described as "more notorious terrorist groups." Four days later, Charles Redman, the spokesman for the United States Department of State, repudiated the Pentagon report.<sup>4</sup>

This Note suggests that there must be a clarification of United States policy with respect to the African National Congress and the present government of South Africa.

The question of a United States foreign policy with respect to the South African government and the ANC is best investigated by looking to the international law of recognition. The collective action of states recognizing and derecognizing other states defines who will be actors in the international legal system.<sup>5</sup> It is the process of recognition that defines relationships within the world community. This Note suggests that the South African government should be derecognized by the United

1. Reuter Libr. Rep., Feb. 3, 1990 (BC cycle).

2. Reuter Libr. Rep., Feb. 9, 1990 (BC cycle).

3. See *Mandela's Release Prompts U.S. to Take Fresh Look at Sanctions*, Christian Sci. Monitor, Feb. 14, 1990, at 1, see *Policies of Apartheid of the Government of South Africa*, G.A. Res. 42/23, 42 U.N. GAOR Supp. (No. 49) at 42, U.N. Doc. A/42/49 (1988).

4. N.Y. Times, Jan. 14, 1989, at L3.

5. J. DUGARD, *RECOGNITION AND THE UNITED NATIONS* 7-12 (1987).

States because it is an illegal and illegitimate government. Simultaneously, the ANC should be afforded diplomatic recognition as a legitimate representative of the people of South Africa.

President de Klerk's pronouncements do not change the status quo in South Africa. The people of South Africa are not represented in international relations with the United States because the present South African government is not representative of the majority of the population. Given the formidable position of the U.S. as a world power, it is unacceptable that the majority of the South African people have no official channel of diplomatic communication with the United States. This Note does not suggest that the ANC should be recognized as the government of South Africa since recognition as a legitimate government can only be granted after the South African people have chosen their own representative through a free and democratic electoral process. However, in the interim between the derecognition of the *apartheid* government and recognition of a legitimate government, the United States should recognize legitimate representatives of the South African people. These legitimate representatives can be determined under the theory of collective recognition.

This Note first provides a brief explanation of the international law of recognition. Second, it presents the international legal status of both the *apartheid* government and the ANC and concludes that the United States should adopt a policy of collective recognition. Under the theory of collective recognition, the ANC should be afforded diplomatic recognition as a legitimate representative of the South African people.

## II. DEFINING RELATIONSHIPS WITH OTHER ENTITIES: LOOKING TO THE LAW OF RECOGNITION

The law of recognition is fraught with inconsistencies and has been plagued by the vacillation of states who use recognition as an instrument of political power.<sup>6</sup> This Note does not attempt to posit a new theory of recognition but proposes that the "collective recognition" theory most accurately describes the current practice of states.<sup>7</sup> Collective recognition is the theory that when a state or government has been recognized by the vast majority of states, it has status as an international person.<sup>8</sup>

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6. L.T. GALLOWAY, *RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES* 1 (1978).

7. See generally J. DUGARD, *supra* note 5, at 7-12.

8. *Id.*

An indicator of collective recognition is status in the United Nations. John Dugard, author of *Recognition and the United Nations*, suggests that status in the UN certifies an entity as an "international person,"<sup>9</sup> thereby eliminating the anomalous situation that arises when an entity is "recognized by State A but not recognized by State B, and [is] therefore apparently both an 'international person' and not an 'international person' at the same time."<sup>10</sup> Collective recognition based on status in the United Nations also cures the inequity of states arbitrarily recognizing an entity as a state, thereby imbuing that state with international status.<sup>11</sup>

Dugard focuses on the recognition of states and refers scholars to other sources for the practice of recognition of governments.<sup>12</sup> South Africa is undoubtedly a member of the international community.<sup>13</sup> However, the collective recognition theory should apply to recognition of the government of South Africa. Although the State of South Africa clearly exists, there are two problems: (1) the population and territory which qualify South Africa for statehood are faulty; and (2) South Africa attained the qualifications of statehood in violation of peremptory rules of international law, in particular the principles of nondiscrimination and self-determination. The State of South Africa, as defined by the *apartheid* government, is therefore without "legal effect" as a state.<sup>14</sup> Because of these defects in South Africa's statehood, the representative of the government of South Africa has been derecognized by the United Nations.<sup>15</sup> Concurrently, the ANC has been recognized by the United Nations, not as an alternative government, but as a legitimate representative of the South African people.<sup>16</sup> The theory of collective recognition may help the United States to define its relationship with the faulty state of South Africa, its present *apartheid* government, and the alternative representative of the South African people, the African National Congress.

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9. *Id.* at 79.

10. *Id.* (quoting J.L. BRIERLY, *THE LAW OF NATIONS* 138 (6th ed. 1963)).

11. *Id.* at 80.

12. *Id.* at 5.

13. Suttner, *Has South Africa Been Illegally Excluded from the UN General Assembly?*, 17 *COMP. & INT'L L.J. S. AFR.* 279, 299 (1984).

14. J. DUGARD, *supra* note 5, at 131; *see infra* notes 21-23 and accompanying text.

15. *See infra* notes 71-88 and accompanying text.

16. *Policies of Apartheid of the Government of South Africa*, G.A. Res. 40/64, 40 U.N. GAOR Supp. (No. 53) at 32, 35, U.N. Doc. A/40/53 (1986).

### III. DEFINING THE UNITED STATES RELATIONSHIP WITH SOUTH AFRICA: WHAT IS THE LEGAL STATUS OF THE STATE AND THE GOVERNMENT?

Although South Africa has met the Montevideo criteria for statehood, under more contemporary statehood definitions the South African state is faulty, and our relations with a "faulty" state must be carefully considered.

#### A. The Statehood of South Africa

The most widely accepted criteria for statehood are defined by the Montevideo Convention on the Rights and Duties of States.<sup>17</sup> As set down in article 1 of the Montevideo Convention, an entity qualifies as a state and will be regarded as a person of international law if "[t]he State . . . possess[es] the following qualifications: (a) a permanent population; (b) a defined territory; (c) [a] government; and (d) the capacity to enter into relations with the other States."<sup>18</sup>

These criteria of statehood are customary international law.<sup>19</sup> They have become law out of a "'concordant practice by a number of states . . . over a considerable period of time,' with a conviction 'that the practice is required by, or consistent with, prevailing international law.'"<sup>20</sup> Since the ratification of the Montevideo Convention, notions of self-determination and human rights have become an important part of international law.<sup>21</sup> Contemporary theorists suggest that self-determination and human rights should be added to the Montevideo criteria for statehood or attach to the criteria for government recognition because they affect the Montevideo requirement that a government have effective control over the national territory.<sup>22</sup> However, rather than making these principles a prerequisite to the existence of a state, the practices of the United Nations General Assembly and Security Council suggest that states which meet the Montevideo criteria for statehood but violate peremptory norms of international law (for example, principles of self-determination

17. J. DUGARD, *supra* note 5, at 127.

18. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 3100, 3 Bevans 145, 147, 165 L.N.T.S. 19, 25.

19. Asmal, *Apartheid and International Law*, 1 REV. CONTEMP. L. 57, 62 (1979).

20. This is the classic definition of customary law articulated by Judge Manley O. Hudson. J. SWEENEY, C. OLIVER, & N. LEECH, *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 168 (3rd ed. 1988).

21. J. DUGARD, *supra* note 5, at 127.

22. *Id.* at 127-28.

or nondiscrimination) are without legal effect as states.<sup>23</sup>

In its 1987 Restatement of the Foreign Relations Law of the United States, the American Law Institute uses the Montevideo Convention definition of statehood but adds: "A state has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed force in violation of the United Nations Charter."<sup>24</sup> A state which violates the peremptory norms of self-determination and human rights is not nonexistent, but rather void *ab initio* by reason of its illegality.<sup>25</sup>

Clearly, South Africa meets the Montevideo criteria of statehood. South Africa has a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.<sup>26</sup> There are, however, two important qualifications to South Africa's statehood which create an obligation of nonrecognition: problems with the definition of South Africa's population and the definition of its territory.

The "population" of the present South African regime comprises only white settlers and their descendants.<sup>27</sup> The black peoples of South Africa, those whom the government classifies as Coloured, Indian, and African, are denied citizenship by the South African Constitution. They have no right to participate in the government which purports to represent them.<sup>28</sup> Thus, the *apartheid* government is without the capacity to speak on behalf of the black population.

The question of what constitutes the "territory" of the South African state has been raised in the United Nations as well as by legal theorists. Under the law of collective recognition, the bantustans, the territories set aside by the *apartheid* government as independant homelands for some of the African tribes, must be considered part of the territory of South Africa and not independent states. The borders of South Africa clearly include the bantustans, and yet the *apartheid* government denies that it is the government of the bantustans.<sup>29</sup> No state other than

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23. *Id.* at 130-31.

24. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 201-202 (1987). Reporter's note 5 to § 202 clarifies: "In principle, an entity that has acquired statehood unlawfully is ineligible for admission to an organization open only to states." *Id.* § 202.

25. J. DUGARD, *supra* note 5, at 130.

26. Theodoropoulos, *The Dual Status of the Republic of South Africa in International Law*, 21 INDIAN J. INT'L L. 563, 573 (1981).

27. *Id.*

28. S. AFR. CONST. art. 52, reprinted in 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, at South Africa 66 (A. Blaustein & G. Flanz eds. 1984).

29. The South African government passed the Bantu Authorities Act in 1951. It created

South Africa has recognized the bantustans as independent "states," and this isolation of a nonrecognized state undermines any claim that it is a state.<sup>30</sup> For all practical purposes, without the collective recognition of the United Nations, the bantustans are not independent states.<sup>31</sup> The people of the bantustans are, therefore, without representation in the international community, and a significant portion of the territory of South Africa has no recognized government.

## B. The Legal Status of the South African Government

### 1. Illegality of the *Apartheid* Regime

The question of the *apartheid* government's legal status under international law has been addressed by many authors.<sup>32</sup> In addition to violating customary international law, *apartheid* is also illegal as a breach of *jus cogens* norms.

Norms having the character of *jus cogens* are so fundamental as to be considered international public policy and not merely customary international law.<sup>33</sup> There has been much debate about which principles qualify as peremptory norms.<sup>34</sup> However, two principles violated by the present South African government are clearly *jus cogens*, the prohibition of racial discrimination and *apartheid*, and the right of self-determination.<sup>35</sup>

One of the consequences of a breach of *jus cogens* is nonrecognition by the United Nations and an obligation of nonrecognition by other states.<sup>36</sup>

The prohibition of systematic racial discrimination and *apartheid* has its source in the United Nations Charter, international conventions, and customary international law.<sup>37</sup> Numerous General Assembly and Security Council resolutions have declared that *apartheid*, in particular,

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tribal, regional, and territorial government authorities. 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 28, at South Africa 7.

30. J. DUGARD, *supra* note 5, at 123-24.

31. G.A. Res. 35/206A, 35 U.N. GAOR Supp. (No. 48) at 29, 30, U.N. Doc. A/35/48 (1980); G.A. Res. 34/93G, 34 U.N. GAOR Supp. (No. 46) at 29, 33, U.N. Doc. A/34/46 (1979); G.A. Res. 32/105N, 32 U.N. GAOR Supp. (No. 45) at 30, 40, U.N. Doc. A/32/45 (1977); G.A. Res. 31/6A, 31 U.N. GAOR Supp. (No. 39) at 10, U.N. Doc. A/31/39 (1976).

32. See, e.g., Kiapi, *The Status of Apartheid in International Law*, 17 INDIAN J. INT'L L. 57, 57 (1977). Under international law *apartheid* is illegal as a violation of human rights, as genocide, as slavery, as a crime against humanity, and as exploitation of the worker. *Id.* at 59.

33. J. DUGARD, *supra* note 5, at 138.

34. *Id.* at 151.

35. *Id.* at 156-62.

36. *Id.* at 136.

37. *Id.* at 156.



is a violation of the peremptory norm of nondiscrimination.<sup>38</sup> The International Court of Justice also condemned *apartheid* in its *Namibia* Opinion. Judge Ammoun wrote: "The equality demanded . . . is something of vital interest to us here, on the one hand, because it is the foundation of other human rights which are no more than its corollaries, and, on the other hand, because it naturally rules out racial discrimination and *apartheid*, which are the gravest of the facts with which South Africa . . . stands charged."<sup>39</sup>

The International Convention on the Suppression and Punishment of the Crime of *Apartheid* condemned *apartheid* in article I, declaring it a "crime against humanity."<sup>40</sup> The Convention further states, "[I]nhuman acts resulting from the policies and practices of *apartheid* and similar policies and practices of racial segregation and discrimination, as defined in article II of this Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations. . . ."<sup>41</sup> The Seminar on the Legal Status of the *Apartheid* Regime and other Legal Aspects of the Struggle Against *Apartheid* (organized under the auspices of the Special Committee Against *Apartheid*) accepted that "if nondiscrimination is a case of *jus cogens*, [then] *apartheid*, perhaps the most monstrous form of racial-discrimination, also constitutes a specific and particular case of a violation of *jus cogens*."<sup>42</sup>

The right to self-determination as expressed in international jurisprudence originated in the United Nations Charter<sup>43</sup> and the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>44</sup> A comprehensive discussion of the subject was undertaken by Hector Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>45</sup> He cited the

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38. *Id.* at 157.

39. Asmal, *Apartheid and International Law*, REV. CONTEMP. INT'L L. 57, 71 (1979) (quoting *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 57 (Advisory Opinion June 21)).

40. *International Convention on the Suppression and Punishment of the Crime of Apartheid*, annex, art. 1, G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75, 75, U.N. Doc. A/9030 (1973).

41. *Id.*

42. *Declaration Adopted by the Seminar on the Legal Status of the Apartheid Regime and Other Legal Aspects of the Struggle Against Apartheid*, 39 U.N. G.A. Annex (Agenda Item 31) at 10, U.N. Doc A/39/324-S/16709 (1984).

43. U.N. CHARTER arts. 1, 55.

44. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc A/4684 (1961).

45. H. GROS ESPIELL, THE RIGHT TO SELF-DETERMINATION: REPORT OF THE SPECIAL

International Law Commission and the Vienna Convention on the Law of Treaties as having specifically called the right of self-determination a *jus cogens* norm.<sup>46</sup> The International Court of Justice affirmed the existence of self-determination as a fundamental international legal principle in the *Western Sahara* case in 1975.<sup>47</sup>

The right to self-determination has been progressively defined by the UN General Assembly. Its essence is the right of a group of people to be free from colonial subjugation.<sup>48</sup> Although not a colonial power in the traditional sense of having overseas colonies, the *apartheid* government of South Africa is a "prototype of a colonial power" because it rules its black population through a policy of "deliberate subordination of the vast majority of the people to an inferior status."<sup>49</sup> The South African government has articulated as its main purpose the keeping of the black population in a state of perpetual subjugation.<sup>50</sup> The *apartheid* government admits that the African peoples of South Africa are non-self-governing. The government has, until recently, blatantly stated that it has no intention of granting them self-government and rejects the right of the UN to regulate or supervise its policies.<sup>51</sup>

The South African government's attempted "reforms,"<sup>52</sup> have been rejected by the UN Commission on Human Rights as continuing to ex-

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RAPPORTEUR OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/405/Rev.1, U.N. Sales No. E.79.XIV.5 (1980).

46. *Id.* at 11.

47. *Western Sahara*, 1975 I.C.J. 12 (Advisory Opinion Jan. 3, 1975).

48. Gorelick, *Apartheid and Colonialism*, 19 COMP. & INT'L L.J. S. AFR. 70 (1986).

49. W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 136 (1977); see also H. GROS ESPIELL, *supra* note 45, at 6.

50. South African Prime Minister Verwoerd said:

Reduced to its simplest form the problem is nothing else than this: we want to keep South Africa White. . . . 'Keeping it White' can only mean one thing, namely, White domination, not 'leadership', not 'guidance', but 'control', 'supremacy'. If we are agreed that it is the desire of the people that the White man should be able to continue to protect himself by retaining White domination . . . we say that it can be achieved by separate development.

W. OFUATEY-KODJOE, *supra* note 49, at 136-37 (quoting U.N., APARTHEID IN SOUTH AFRICA 11 (1963)).

51. *Id.* at 138. The recent moves by President de Klerk may indicate a retraction from this position but at this time there have been no formal moves towards allowing self-government.

52. See Address by State President P.W. Botha at the opening of the third session of the eighth Parliament of the Republic of South Africa (Jan. 31, 1986), reprinted in 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 28, at South Africa Supp. 9, 12-14, in which the President refers to, for example, the establishment of a single education department, a uniform identity document for all groups, and a restructuring of provincial governments as potential reforms.

clude the majority black population from participating in the political, social, economic, and cultural life of their country and continuing to deny the black population their full citizenship rights.<sup>53</sup> While President de Klerk's recent unbanning of the ANC and release of Nelson Mandela are positive steps, they are not moves towards self-government or even integration of the majority population into the present government structure.

The right of self-determination is articulated in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations<sup>54</sup> and the Definition of Aggression.<sup>55</sup> The Declaration on Principles of International Law proclaims that every State has "a duty to promote . . . realization of the principles of equal rights and self-determination of peoples . . ." and states that no action shall be taken to disrupt the territorial integrity or national unity of a "government representing the whole people belonging to the territory without distinction as to race, creed or colour."<sup>56</sup> The General Assembly's Definition of Aggression provides that nothing in the definition can prejudice the right of self-determination, freedom, and independence of peoples under "colonial and racist regimes or other forms of alien domination."<sup>57</sup> The test for suppression of self-determination, within the meaning of international law, is primarily whether the government is indigenous and not restricted to one race or a minority of the population to the exclusion of the majority of the people.<sup>58</sup> The right to self-determination is violated when the government is a colonial or other alien occupation force, ruling at the expense of the indigenous people.<sup>59</sup> The *apartheid* Parliament, by the terms of the South African Constitution, is dominated by whites.<sup>60</sup> South African lawyer and legal scholar, Albie Sachs, characterized the

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53. Comm'n on Hum. Rts. Res. 1987/14, 1987 U.N. ESCOR Supp. (No. 5) at 50, 52, U.N. Doc. E/1987/18 [E/CN.4/1987/60] (1987).

54. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, 122, U.N. Doc. A/8028 (1970).

55. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, 143, U.N. Doc. A/9631 (1974).

56. G.A. Res. 2625, *supra* note 54, annex, at 123-24, 124.

57. G.A. Res. 3314, *supra* note 55, annex, art. 7, at 144.

58. Suttner, *supra* note 13, at 299.

59. *Id.*

60. S. AFR. CONST., *supra* note 28, arts. 37-52, *reprinted in* 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 28, at South Africa 56-68. The white House of Parliament, the House of Assembly, has 178 members as compared to the Indian House of Delegates with 45 members and the coloured House of Representatives with 85 members. *Id.* at South Africa 58-60.

Constitution as setting out two separate systems of government: "The first consists of a Parliament and ministers in an independent state accountable to a white electorate. The second is a system of rule over a rightless and subordinate black majority by a white administration which disown[s] a common citizenship. By their own theory and law, the rulers of South Africa treat the majority of the population as a separate and alien people."<sup>61</sup>

## 2. Illegitimacy of the *Apartheid* Regime

Legitimacy concerns the consent or acquiescence of the population in the political and economic arrangements that govern their lives.<sup>62</sup> The black majority of South Africa has never consented, acquiesced, or even attempted to participate in the *apartheid* government which rules their lives.<sup>63</sup> In fact, the black majority has consistently rejected and struggled against *apartheid*.<sup>64</sup>

The South African government has never made any genuine attempt to involve the black population in its structures.<sup>65</sup> The present moves towards negotiations between the government and the ANC will not represent genuine involvement until the majority is granted citizenship.

Political legitimacy is obtained by governments in various ways: by coercion or repression; by encouraging the participation of recalcitrant majorities or minorities in government; by the cooption of leading dissident forces into the ruling elite; or by a democratic process, the extension of suffrage.<sup>66</sup> On the basis of color, South Africa denies eighty percent of the population minimal rights of citizenship.<sup>67</sup> This breach of a fundamental norm of international law, the right to self-determination, confirms its illegitimacy.<sup>68</sup>

This discussion should not imply that any resistance to a regime makes that regime illegitimate. Government oppression does not necessarily constitute suppression of the right of self-determination within the

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61. Asmal, *Apartheid South Africa: The Illegitimate Regime*, in CENTRE AGAINST *Apartheid*, Notes and Documents from the World Conference for Action Against *Apartheid* 5 (U.N. publ. Conf. 6, Nov. 1977) (emphasis deleted).

62. *Id.* at 6.

63. Indians and coloureds *have* voted for Members of Parliament. However, "[f]ewer than twenty percent of eligible mixed-race residents and Indians voted in 1984." Chicago Trib., Aug. 4, 1989, at C6.

64. Asmal, *supra* note 61, at 6. "[M]ore unfranchised blacks protested on election day than whites voted . . . ." Washington Post, Sept. 10, 1989, at C6, col. 1.

65. Asmal, *supra* note 61, at 6.

66. *Id.*

67. *Id.* at 3.

68. *Id.* at 13.

meaning of the United Nations Charter.<sup>69</sup> The governing regime must be colonial in nature for its constituents to have the right to self-determination. The authoritative Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations states that once a colony is freed from its colonialist power it has exercised its right to self-determination within the meaning of the Charter.<sup>70</sup> The resistance to the South African regime is not merely a battle for a change in government. It is a battle for independence from the racist regime and for exercise of the South African people's right to self-determination.

#### IV. THE PRACTICAL RESULT OF ILLEGALITY AND ILLEGITIMACY: THE DECREDENTIALIZATION OF THE *APARTHEID* GOVERNMENT BY THE UNITED NATIONS GENERAL ASSEMBLY AND THE WITHDRAWAL OF COLLECTIVE RECOGNITION FROM THE *APARTHEID* REGIME

As an illegal and illegitimate government, the *apartheid* regime has been decREDENTIALIZED in the United Nations.<sup>71</sup> Since 1974 representatives of the government of the Republic of South Africa have not been allowed to take the seat reserved for South Africa in the General Assembly of the UN.<sup>72</sup> The credentials of the South African delegation were rejected by both the Credentials Committee and the General Assembly.<sup>73</sup> United Nations President Bouteflika, when asked for a ruling on the status of the South African delegation, responded that one might legitimately infer that the credentials of any delegation authorized by the *apartheid* government would be similarly rejected and that this was tantamount to saying that the General Assembly refuses to allow the *apartheid* delegation to participate in its work.<sup>74</sup> He interpreted the decision of the General Assembly as leaving open the question of the membership status of the Republic of South Africa in the United Nations.<sup>75</sup> This decision continues to be left to the Security Council.<sup>76</sup>

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69. Suttner, *supra* note 13, at 298.

70. *Id.* However, a colony is still not considered to be fully self-governing until it has control over its entire territory, including all resources. *Id.*

71. *Id.* at 279.

72. *Id.*

73. *Id.*

74. Abbot, *The General Assembly, 29th Session: The Decredentialization of South Africa*, 16 HARV. INT'L L.J. 576, 577 (1975).

75. *Id.*

76. *Id.*

The UN decided to reject the credentials of the South African delegation because the *apartheid* regime was not representative of the people of South Africa and, therefore, should not be recognized. The representative of Senegal explained that his delegation objected to the acceptance of the credentials of the representatives of South Africa:

The representatives of South Africa to the General Assembly had been appointed by a Government which was the product of racial criteria and, as an institution, represented only a very small fraction of the South African population. South Africa's racial policies had repeatedly been condemned by the United Nations, and that country would certainly not have been admitted as a Member of the United Nations in 1945 had the policy of *apartheid* been put into law at the time. Furthermore, the question under consideration was to exclude not South Africa as a State Member of the United Nations, but solely the South African delegation, as it could not be considered that the latter represented the country—even though black or "coloured" people had been included this time as representatives. In conclusion, Senegal would propose that the Committee reject the credentials of the representatives of South Africa to the 29th session of the General Assembly.<sup>77</sup>

The Chairman of the Credentials Committee, speaking on behalf of the Philippines, cited General Assembly Resolution 3151 G (XXVIII) of December 14, 1973, paragraph 11, which "declares that the South African regime has no right to represent the people of South Africa and that the liberation movements recognized by the Organization of African Unity are the authentic representatives of the overwhelming majority of the South African people."<sup>78</sup>

In the decredentiaization of the South African delegation, the United Nations effectively withdrew its recognition of the *apartheid* regime as the de facto government of South Africa. A de facto government exercises power over the entire territory of the state;<sup>79</sup> a de jure government comes into power in conformity with the constitution of the state.<sup>80</sup> Although South Africa's *apartheid* regime effectively exercises power over the territory, the UN refuses to recognize it as the de facto government because of its illegality and illegitimacy.

The principal conditions of government recognition are representativeness (legitimacy)<sup>81</sup> and legality.<sup>82</sup> Of particular concern are any vio-

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77. *First Report of the Credentials Committee*, 29 U.N. GAOR Annex (Agenda Item 3) at 2, U.N. Doc. A/9779 (1975).

78. *Id.* at 3.

79. See H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 337 (1947).

80. *Id.*

81. *First Report of the Credentials Committee*, *supra* note 77, at 2. Although the condition

lations of *jus cogens* which automatically create an obligation of nonrecognition.<sup>83</sup> The *apartheid* regime is not a government of the people of South Africa; it has, by its law and constitution, denied citizenship to the majority of its population.<sup>84</sup> The United Nations, representing the international community, considers the *apartheid* regime illegitimate<sup>85</sup> and illegal under international law.<sup>86</sup> Because South Africa is a colonial power, keeping its population under subjugation in violation of the *jus cogens* norms of self-determination and nondiscrimination,<sup>87</sup> there arises an obligation of nonrecognition by other states, particularly other UN member states.<sup>88</sup>

## V. DEFINING THE RELATIONSHIP OF THE UNITED STATES WITH THE AFRICAN NATIONAL CONGRESS: LOOKING TO COLLECTIVE RECOGNITION OF THE ANC AS A GUIDE

Just as United Nations decredentialization is indicative of a withdrawal of collective recognition, the United Nations recognition of the African National Congress is an act of collective recognition imbuing the ANC with status as an international person and creating a precedent for recognition by member states. This section examines the recognition of the ANC by the United Nations, the Organization of African Unity, other states, and the people of South Africa. While none of these bodies currently recognize the ANC as the government of South Africa, they afford the ANC status as a legitimate representative of the people.

### A. Collective Recognition by the United Nations

The General Assembly of the United Nations granted observer status to the ANC in 1975.<sup>89</sup> By granting observer status, the UN recognized the ANC as a legitimate representative of the South African

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of legitimacy has been questioned by legal scholars, *see, e.g.*, H. LAUTERPACHT, *supra* note 79, at 137-38, the practice of the Credentials Committee with respect to the South African delegation would indicate that representation of the governed is a condition to recognition by the United Nations.

82. J. DUGARD, *supra* note 5, at 135.

83. *Id.* at 135-36.

84. Asmal, *supra* note 61, at 3.

85. *See id.* at 8.

86. Kiapi, *supra* note 32, at 59.

87. *Id.*

88. *See generally* J. DUGARD, *supra* note 5, at 81-163.

89. *Cooperation between the United Nations and the Organization of African Unity*, G.A.

people.<sup>90</sup> This position has been further strengthened by recent General Assembly resolutions which proclaim the General Assembly's "full support of the national liberation movements of South Africa as the authentic representatives of the South African people in its just struggle for freedom."<sup>91</sup>

The General Assembly has expressed its support for the national liberation movements of Africa in a long series of annual resolutions each entitled Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>92</sup> These resolutions embody five basic principles: (1) the resistance of liberation movements to the colonial and racist regimes of their territories is legitimate; (2) liberation movements may utilize "all the necessary means at their disposal" for the termination of colonialism and racism in their territories; (3) all states and organizations associated with the United Nations should provide "moral and material assistance" to the movements; (4) when dealing with matters concerning the African territories for which national liberation movements exist, organizations associated with the United Nations should provide for the representation of those movements at their deliberations and conferences; and (5) support for and representation by the national liberation movements should be provided only "in consultation, as appropriate," with the Organization of African Unity (OAU).<sup>93</sup>

Since the UN resolutions defer to the OAU, it is necessary to look to the OAU's position on South Africa. The OAU has recognized both the Pan Africanist Congress (PAC) and the African National Congress as national liberation movements of South Africa.<sup>94</sup> This recognition has been confirmed and supported by the UN.<sup>95</sup>

The Special Committee Against *Apartheid*, a committee of the General Assembly, associates the ANC with its work and has granted it ob-

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Res. 3412, 30 U.N. GAOR Supp. (No. 34) at 5, 6, U.N. Doc. A/10034 (1976); G.A. Res. 3280, 29 U.N. GAOR Supp. (No. 31) at 5, 5, U.N. Doc. A/9631 (1974).

90. H. GROS ESPIELL, *supra* note 45, at 15.

91. *Policies of Apartheid of the Government of South Africa*, *supra* note 16, at 35.

92. Travers, *The Legal Effect of United Nations Action In Support of the Palestine Liberation Organization and the National Liberation Movements of Africa*, 17 HARV. INT'L L.J. 560, 562 (1976).

93. *Id.* at 563-64.

94. This Note does not discuss the status of the Pan African Congress or propose that it be recognized by the U.S. as the legitimate representative of the South African people because it is an African nationalist organization and thus does not represent all of South Africa's peoples. It also has significantly less support inside South Africa than the ANC does. See Reuter Libr. Rep., Oct. 2, 1989 (BC cycle).

95. Murray, *The 1977 Geneva Protocols and Conflict in Southern Africa*, 33 INT'L & COMP. L.Q. 462, 464 (1984).



server status.<sup>96</sup> The ANC is regularly consulted in the preparation of the Special Committee's reports to the General Assembly.<sup>97</sup> In the Special Committee's most recent report, the prominence of the national liberation movements was noted as "demonstrat[ing] the centrality of their role in any solution to the conflict," as well as reaffirming the legitimacy of the struggle and urging the international community to extend all possible assistance to the people of South Africa and their national liberation movements.<sup>98</sup>

The status of the ANC allows it to be involved in UN conferences including the World Population Conference, the World Food Conference, the Third United Nations Conference on the Representation of States in their Relations with International Organizations, the World Conference of the International Women's Year, the 1976 United Nations Conference on Human Settlements, the Conference of Plenipotentiaries on the Establishment of an International Fund for Agricultural Development, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, and the annual Conferences of Non-Aligned Countries.<sup>99</sup> The participation of the ANC in these conferences is indicative of recognition of the legitimacy of the ANC by the other conference participants.

A recent UN General Assembly resolution, *Policies of Apartheid of the Government of South Africa*, reaffirms the legitimacy of the struggle of the oppressed people of South Africa for the total eradication of *apartheid* and for the establishment of a nonracial, democratic society in which all the people, irrespective of race, color, or creed, can enjoy fundamental freedoms and human rights.<sup>100</sup> The resolution also pays tribute to organizations and individuals struggling against *apartheid* and working for a nonracial, democratic society that reflects the principles of the Universal Declaration of Human Rights.<sup>101</sup> The resolution further reaffirms the legitimacy of the struggle of the people of South Africa and their right to choose the necessary means, including armed resistance, to attain the eradication of *apartheid*.<sup>102</sup> The General Assembly, by this

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96. *Report of the Special Committee Against Apartheid*, 30 U.N. GAOR Supp. (No. 22) at 26, U.N. Doc. A/10022 (1975).

97. Travers, *supra* note 92, at 567 n.22.

98. *Report of the Special Committee Against Apartheid*, 42 U.N. GAOR Supp. (No. 22) at 29, 31-32, U.N. Doc. A/42/22 (1987).

99. Travers, *supra* note 92, at 567 nn.18-22.

100. *Policies of Apartheid of the Government of South Africa*, G.A. Res. 43/50, 43 U.N. GAOR Supp. (No. 49) at 49, 55, U.N. Doc. A/43/49 (1989).

101. *Id.*

102. *Id.* at 49.

resolution, also reaffirms its commitment to supporting the national liberation movements in South Africa, calling on all states, intergovernmental and nongovernmental organizations, mass media, city and other local authorities, and individuals to increase political, economic, educational, legal, humanitarian, and all other forms of necessary assistance to the people of South Africa and their national liberation movements.<sup>103</sup>

The General Assembly specifically urges all countries to contribute generously to the Action for Resisting Invasion, Colonialism, and *Apartheid* Fund set up by the Eighth Conference of Heads of State of Governments of Non-Aligned Countries with the aim of increasing support to the liberation movements fighting the *apartheid* regime and to the front-line states which border South Africa.<sup>104</sup> The UN has also decided to continue funding the South African liberation movements recognized by the Organization of African Unity, enabling the African National Congress and the Pan Africanist Congress to maintain offices in New York.<sup>105</sup>

The language of recent UN resolutions, calling for the establishment of a nonracial, democratic society in which all the people, irrespective of race, color, or creed, enjoy fundamental freedoms and human rights,<sup>106</sup> is very similar to the language of the ANC's principal political platform, the Freedom Charter, which begins:

That South Africa belongs to all who live in it, black and white, and that no Government can justly claim authority unless it is based on the will of all the people; . . . that only a democratic State, based on the will of all the people, can secure to all their birthrights without distinction of colour, race, sex or belief . . .<sup>107</sup>

This alignment of the UN with the ANC's ideals can be read as further evidence of recognition of their status.

## B. Collective Recognition by the Members of the Organization of African Unity

The United Nations recognition of the ANC is stated in terms of the recognition of South African national liberation movements by the Or-

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103. *Id.* at 50.

104. *Id.*

105. *Id.*

106. *Id.* at 55.

107. The Freedom Charter, June 1955, reprinted in *CENTRE AGAINST Apartheid*, Notes and Documents from the World Conference for Action Against *Apartheid* 1 (U.N. publ. June 1978).

ganization of African Unity.<sup>108</sup> In 1963 the UN adopted Resolution 2555, recommending that specialized agencies support liberation struggles "in co-operation with the OAU and through it, with the national liberation movements" and requesting that the specialized agencies "establish relationships and other special arrangements with the the OAU."<sup>109</sup> This resolution led to an agreement of cooperation between UNESCO and the OAU and to invitations by various specialized agencies to the ANC and the PAC to sit as observers.<sup>110</sup> Recently, the OAU endorsed the ANC's proposal for a negotiated settlement with the current South African regime.<sup>111</sup> The OAU recognized the ANC and the PAC as the authentic liberation movements of South Africa in AHG/Resolution 34(II) stating that "the Assembly 'Invites the South African liberation movements to concert their policies and actions and intensify the struggle for full equality, and appeals to all States to lend moral and material assistance to the liberation movements in their struggle.'"<sup>112</sup>

Another important recognition of the ANC by the OAU came with the establishment of the African Liberation Committee (originally known as the Committee of Nine) in 1963.<sup>113</sup>

The Liberation Committee, like the UN, extends influential recognition to national liberation movements. Recognition by the Liberation Committee gives liberation movements access to funding from donor countries, access to the OAU and UN conferences, and the right to participate in debates and to initiate resolutions on issues involving their territories.<sup>114</sup> To be recognized, a national liberation movement must meet certain criteria including a demonstrated success in the battlefield or a popular following.<sup>115</sup> This recognition imbues a group with interna-

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108. The UN appealed to all states, organizations, and institutions to increase humanitarian, legal, educational, and other such assistance and support to the victims of *apartheid*, to the liberation movements recognized by the Organization of African Unity and for a non-racial, democratic society in South Africa. *Policies of Apartheid of the Government of South Africa*, *supra* note 100, at 55.

109. G.A. Res. 2555, 24 U.N. GAOR Supp. (No. 30) at 70, 70, U.N. Doc. A/7630 (1969).

110. Gorelick, *supra* note 48, at 78-79.

111. Washington Post, Sept. 25, 1989, at A17. The ANC claims that this recognition of the OAU (and the endorsements of the eight front-line states and the Nonaligned Movement) is in preparation for the proposal's adoption as a UN Security Council Resolution. *Id.*

112. Gorelick, *supra* note 48, at 80 n.45.

113. Stokes, *External Liberation Movements*, in RACE AND POLITICS IN SOUTH AFRICA 208-09 (I. Robertson & P. Whitten eds. 1978).

114. C.O.C. AMATE, INSIDE THE OAU: PAN-AFRICANISM IN PRACTICE 283 (1986).

115. See Folz & Widner, *The OAU and Southern African Liberation*, in THE OAU AFTER TWENTY YEARS 262 (Y. El-Ayouty & I. Zartman eds. 1984); see, e.g., Stokes, *supra* note 113, at 209. The Liberation Committee temporarily withdrew its recognition of the Pan African Congress in 1967 because of the organization's ineffectiveness and continued refusal to form a

tional personality and legitimacy.

The OAU's recognition of the national liberation movements, besides providing them with status in the United Nations, is an expression of the moral and material support of all OAU member states.<sup>116</sup> Recognition of the ANC by the OAU, like the UN, is evidence of the collective recognition of the ANC as the representative of the South African people and implies that under international law there is an obligation of recognition by other states.

Since the recent release of Nelson Mandela and the unbanning of the ANC, the OAU has reiterated its stand of opposition to the *apartheid* government and its support for the African National Congress.<sup>117</sup>

### C. Independent Recognition by Individual States

In February 1990 the ANC was invited to attend a summit meeting of the Frontline States (Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe.)<sup>118</sup> In 1984, the leaders of Angola, Cape-Verde, Guinea-Bissau, Mozambique, Sao-Tome, and Principe met in Maputo, Mozambique, and expressed their solidarity with the ANC.<sup>119</sup>

The South African Development Coordination Conference (SADCC), comprised of Angola, Botswana, Lesotho, Malawi, Mozambique, Zimbabwe, Zambia, Swaziland, and Tanzania was formed in 1979.<sup>120</sup> Its objectives are: (1) reduction of economic dependence, especially on South Africa; (2) forging links to create a genuine and equitable regional integration; and (3) mobilization of resources to promote national, interstate, and regional policy.<sup>121</sup> Like the OAU, SADCC is a voice of collective recognition expressing the support of its member states for the liberation of Southern Africa. SADCC has expressed its recogni-

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united front with the ANC. This recognition was restored in 1968 and the Liberation Committee continues to recognize both the ANC and the PAC. *Id.*

116. Kapunga, *The OAU's Support for the Liberation of Southern Africa*, in *THE ORGANIZATION OF AFRICAN UNITY AFTER TEN YEARS: COMPARATIVE PERSPECTIVES* 141 (Y. El-Ayouty ed. 1975).

117. *See* Reuter Libr. Rep., Feb. 16, 1990 (BC cycle). "The Organization of African Unity urged governments on Friday to maintain economic sanctions against South Africa as pressure on Pretoria to scrap apartheid." *Id.* *See also* Inter Press Serv., Feb. 2, 1990 (The liberation committee welcomed the unbanning of the ANC but said that more changes are needed before the committee would accept de Klerk's moves to end apartheid in South Africa.).

118. Reuter Libr. Rep., Feb. 21, 1990 (AM Cycle).

119. Gorelick, *supra* note 48, at 82.

120. Jaffee, *The Southern African Development Co-ordination Conference*, in *SOUTH AFRICAN RESEARCH SERVICE, SOUTH AFRICAN REVIEW ONE: SAME FOUNDATIONS, NEW FACADES?* 23 (1983).

121. *Id.*

tion of the ANC by inviting its representatives to participate in conferences as an observer.<sup>122</sup>

Outside southern Africa, the ANC has offices in Algeria, Angola, Australia, Belgium, Canada, Cuba, Denmark, Egypt, Ethiopia, Finland, France, the German Democratic Republic, German Federal Republic, India, Italy, Japan, Kenya, Madagascar, Netherlands, Nigeria, Norway, Senegal, Sweden, Tanzania, the United Kingdom, the United States, the USSR, and Zambia.<sup>123</sup> It is difficult to generalize about the status of the ANC in each host country. While Cuba, Kenya, the German Democratic Republic, the Soviet Union, and all of the Scandinavian countries have granted the ANC full diplomatic status, other countries have given varying degrees of status to the ANC missions.<sup>124</sup> Mozambique has granted "quasi-diplomatic" status to the ANC.<sup>125</sup> The Angolan government claims that there are no ANC military bases inside Angola but that it does offer moral and diplomatic support to the ANC.<sup>126</sup> Zimbabwean President Robert Mugabe in 1988 reiterated his country's diplomatic and material support for the ANC.<sup>127</sup>

## VI. RECOGNITION OF THE ANC BY THE PEOPLE OF SOUTH AFRICA

When the United States government reviews the status of the ANC and the option of affording the ANC status as a legitimate representative of the South African people, it should look not only to the collective recognition of the ANC by other states but also to the recognition of the ANC by the people of South Africa. This recognition is evidence of the ANC's representativeness and, thereby, its legitimacy.<sup>128</sup>

Because the ANC has been banned in South Africa,<sup>129</sup> it has been difficult to document support and recognition of the ANC in the country itself. In the next few months, groups and individuals will be aligning with the ANC, and there will be a true measure of the ANC's representa-

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122. *Id.* at 29.

123. 42 SECHABA OFFICIAL ORGAN OF THE AFRICAN NATIONAL CONGRESS SOUTH AFRICA, at inside back cover (Jan. 1990).

124. Telephone interview with Neo Mnumzana, former Chief Representative of the ANC to the United Nations (Aug. 14, 1988). The Soviets have completely broken off relations with the *apartheid* regime while providing both arms and diplomatic support to the ANC. Chicago Trib., July 27, 1989, at C2. Regarding Zambia, see L.A. Times, May 5, 1989, at 9, col. 4.

125. Reuter Libr. Rep., Dec. 27, 1988 (AM cycle).

126. Inter Press Serv., Dec. 21, 1988.

127. Xinhua Gen. Overseas News Serv., June 28, 1988, Item No. 0628039.

128. See *supra* text accompanying notes 62.

129. See Stokes, *supra* note 113, at 204.

tive status.<sup>130</sup> However, until the ANC is truly operative within South Africa, we must look to the public support of other anti-*apartheid* groups such as the Congress of South African Trade Unions and the United Democratic Front, members of the Mass Democratic Movement.<sup>131</sup> Since the unbanning of the ANC, these groups have openly called themselves ANC allies.<sup>132</sup> These anti-*apartheid* groups have adopted the Freedom Charter and support the same democratic ideals as the ANC.<sup>133</sup> Since the unbanning of the ANC, these groups have begun considering mergers or affiliations with the ANC.<sup>134</sup>

#### A. The Largest Trade Union in South Africa Supports the ANC

The trade union movement in South Africa is an overtly political movement which takes active stands against *apartheid* policies as well as performing traditional collective bargaining functions.<sup>135</sup> The Congress of South African Trade Unions (COSATU), the largest union, has over a million members.<sup>136</sup> Founded in 1985, it is a federation of fourteen affiliated unions. COSATU announced its fraternity with the ANC in a meeting in Lusaka in 1985<sup>137</sup> and signed the Freedom Charter in 1987.<sup>138</sup> Elijah Barayi, COSATU's first president, was a member of the ANC before it was banned.<sup>139</sup> At the time of COSATU's formation, "[a] COSATU representative observed that the new organization shared many political objectives with the ANC. At an impromptu press conference after the new federation was launched, Barayi told reporters that COSATU hoped to fill the vacuum that has existed since 1960, when the ANC was banned."<sup>140</sup> In December 1989, shortly before Mandela's release, a five member delegation of COSATU met with Nelson Mandela in prison to exchange views on the situation in South Africa. A representa-

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130. At some point there will be an election at which true legitimacy will be decided, but until then the United States may look to groups and individuals as evidence of which groups are legitimate representatives.

131. The Mass Democratic movement is the new umbrella group of the anti-apartheid organizations. Its spokesperson, Murphy Morobe, was a former officer of the ANC, and many consider that the group is inspired and led by the ANC from its headquarters in Lusaka, Zambia. DeKlerk, *Risk a Leap Toward Negotiations*, L.A. Times, Oct. 23, 1989, at B5, col. 3.

132. Christian Sci. Monitor, Feb. 26, 1990, at 3.

133. M. ORKIN, *DISINVESTMENT: THE STRUGGLE AND THE FUTURE* 48 (1986).

134. ANC Newsbriefing, Feb. 4, 1990, at 3, col. 3.

135. Christian Sci. Monitor, June 6, 1988, at 9.

136. S. DAVIS, *APARTHEID'S REBELS* 165-66 (1987).

137. *Id.*

138. Christian Sci. Monitor, Aug. 31, 1987, at 7.

139. Christian Sci. Monitor, Dec. 6, 1985, at 21.

140. *Id.*

tive of COSATU noted that Mandela was able to act as a liaison between the government and the mass democratic movement.<sup>141</sup> This statement further evidences the recognition and respect accorded COSATU and the ANC.

## B. UDF Membership Reflects Support for the ANC

Like the trade unions, community groups in South Africa play dual roles as community organizers working for social change and political movements working for political change. The United Democratic Front (UDF) is a coalition of anti-*apartheid* community organizations.<sup>142</sup>

Nearly 700 community bodies (civic organizations, women's groups, labor unions, youth leagues, and religious councils) are affiliated with the UDF.<sup>143</sup> Since the unbanning of the ANC, the UDF has come out openly as its ally.<sup>144</sup> Although the UDF is still independent of the ANC, its political philosophy, leadership, and strategies all reflect compatible political goals.<sup>145</sup> Some of the campaigns of the UDF directly recognize the ANC's status as the authentic liberation movement of the South African people.<sup>146</sup> The UDF campaigned to free jailed ANC leader Nelson Mandela and to unban the ANC, and many of the UDF leaders were former officers of the ANC.<sup>147</sup> Bishop Desmond Tutu, patron of the UDF, has called for western leaders to support the efforts of the ANC.<sup>148</sup> As Bishop Tutu put it, the ANC "sought to change an unjust system peacefully, non-violently, [until] they were sent into the arms of the struggle through violence because the West abandoned us."<sup>149</sup>

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141. Xinhua Gen. Overseas News Serv., Dec. 20, 1989, Item No. 1220209.

142. S. DAVIS, *supra* note 136, at 87.

143. *Id.*

144. On the day of Mandela's release, Patrick Lekota, an ANC leader and publicity secretary for the UDF, said that Mandela would continue to be the leader of black South Africans. The Boston Globe, Feb. 11, 1990, Metro, at 8 (city ed.). See *supra* notes 132-34 and accompanying text.

145. S. DAVIS, *supra* note 136, at 87 (for example, the goals of releasing all political prisoners, repeal of the Group Areas Act, and universal suffrage).

146. See *id.* at 77-115.

147. For example, Henry Mutile Fazzie, UDF leader in Port Elizabeth, had served as a commander in Umkhonto we Sizwe during the ANC's 1961-63 sabotage campaign, and Archie Gumede and Oscar Mpetha are both UDF officers and former ANC campaign veterans. S. DAVIS, *supra* note 136, at 88.

148. M. ORKIN, *supra* note 133, at 48.

149. *Id.* In addition to being the 1988 winner of the Nobel Peace Prize, Bishop Tutu is General Secretary of the SACC (South African Council of Churches) and a patron of the National Forum, both of which are active anti-*apartheid* organizations.

### C. Recognition of the ANC by the Business Community

The white business community of South Africa, recognizing the inevitability of the end of *apartheid*, has begun to open discussions with the ANC in an attempt to equate the goals of black power with corporate interests in a system that preserves free enterprise.<sup>150</sup> A whirlwind of critical declarations, resolutions, and advertisements since the 1976 Soweto riots culminated in a highly publicized 1985 summit in Zambia of corporate executives led by Gavin Relly, chairman of Anglo-American Corporation, and ANC delegates.<sup>151</sup> Additionally, in 1987 a moderate, largely Afrikaaner group, the Institute of Democratic Alternatives for South Africa (IDASA), led by former Progressive Federal Party leader, Fredrik van zyl Slabbert, held a well publicized meeting with the ANC in Dakar, Senegal.<sup>152</sup> In July 1989 IDASA again met with the ANC at its offices in Lusaka.<sup>153</sup> IDASA "has been responsible for large numbers of liberal whites and dissident Afrikaners meeting exiled members of the outlawed African National Congress (ANC) and opening a dialogue."<sup>154</sup>

## VII. THE UNITED STATES PRACTICE OF RECOGNITION

In recent years the U.S. has not articulated its foreign policy in terms of recognition. It has instead blurred the distinction between formal recognition and diplomatic relations.<sup>155</sup> The United States policy most closely follows the Estrada Doctrine,<sup>156</sup> a policy of recognizing only new states and not new governments.<sup>157</sup> However, the U.S. does not adhere strictly to this doctrine when it perceives a major political advantage in using recognition as an instrument of foreign policy.<sup>158</sup> The situation in Angola is an example. The U.S. continues to withhold diplomatic relations from the MPLA because it favors the policy of Jonas Savimbi's UNITA movement.<sup>159</sup> Secretary of State Kissinger justified this nonrecognition as a policy of refusal to recognize new governments who have

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150. S. DAVIS, *supra* note 136, at 165.

151. *Id.* at 97.

152. Rotberg, *The Collapse of South Africa's White Politics*, Christian Sci. Monitor, Mar. 16, 1988, at 13.

153. Inter Press Serv., July 10, 1989.

154. Christian Sci. Monitor, Jan. 23, 1990, The World, at 4.

155. L.T. GALLOWAY, *supra* note 6, at 147.

156. *Id.* at 149.

157. *Id.* at 8.

158. *Id.* at 124-25.

159. *Id.* at 121-23.



seized power with the help of outside forces.<sup>160</sup>

The U.S. recognizes the state of South Africa but has not addressed the dilemma of government recognition because it sees political advantages to a continued relationship with the *apartheid* regime.<sup>161</sup> Chester Crocker, Assistant Secretary of State for African Affairs from 1981 to 1989, explaining the U.S. constructive engagement policy in South Africa, said that the United States was "‘compet(ing) with our global adversary in the politics of a changing region whose future depends on those who participate in shaping it.’"<sup>162</sup>

The U.S. policy of ignoring the question of government recognition is unsatisfactory with respect to the situation in South Africa. Although the state of South Africa exists and the *apartheid* regime facially controls the state, the United States, as a member of the international community, is obligated to derecognize the *apartheid* regime.<sup>163</sup> Correspondingly, there is an obligation to recognize the African National Congress as a legitimate representative of the people of South Africa.

The United States should abide by the law of collective recognition with respect to its foreign policy in South Africa. In considering when to grant diplomatic status, the U.S. should first consider the status of the *apartheid* government and the ANC as "international entities" by looking to collective recognition by the United Nations.<sup>164</sup> Second, it should consider the representativeness of the government and the people's right to self-determination. In the same way that the Credentials Committee of the UN considered these factors in derecognizing the present *apartheid* regime in South Africa, these factors should be considered in the determination of whom to recognize.

## VIII. CONCLUSION: EVALUATING UNITED STATES POLICY WITH RESPECT TO SOUTH AFRICA

Governments are regarded as legitimate whose power derives from the customs and values prevalent in the society.<sup>165</sup> These customs and values are demonstrated by the choices of the eligible political participants in society.<sup>166</sup> As the South African people have not yet exercised

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160. *Id.* at 122.

161. *See generally* Crocker, *Southern Africa: Eight Years Later*, 68 FOREIGN AFF. 144 (Fall 1989).

162. *Id.* at 145.

163. *See supra* text accompanying note 88.

164. *See generally* J. DUGARD, *supra* note 5, at 41-80.

165. A. IWANSKA, EXILED GOVERNMENTS: SPANISH AND POLISH 11 (1981).

166. *Id.*

their right to self-determination, they are not political participants in the present *apartheid* government. Until they have exercised this right and become political participants, the South African government will not be legitimate. The legitimate liberation movement of the South African people, the ANC, is the chosen representative of the people in international relations and should be afforded diplomatic status.

The next logical step in the legitimate struggle of the oppressed people of South Africa for the "total eradication of *apartheid* and for the establishment of a nonracial democratic society in which all people, irrespective of race, color or creed, enjoy fundamental freedoms and human rights"<sup>167</sup> is diplomatic recognition of the African National Congress by other states.

The United States can and should take this step.

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167. *Policies of Apartheid of the Government of South Africa*, *supra* note 100, at 55.

